Filed 4/8/19 P. v Saetern CA3
Received for posting 4/9/19

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. NATHAN SAETERN, Defendant and Appellant.	C080396 (Super. Ct. No. 15F0654)

As the trial court noted during judgment and sentencing in this case, the evidence showed defendant Nathan Saetern engaged in a pattern of domestic violence against the victim "that had been ongoing for a number of years and [was] perpetrated primarily through victim degradation and extreme emotional abuse that placed [the victim] in fear of the defendant." The events culminated in abuse on February 2 and 3, 2015, for which a jury convicted defendant of dissuading a witness by force or threat (Pen. Code, § 136.1,

subd. (c)(1)),[1] criminal threat (§ 422), attempted forcible penetration with a foreign object (§§ 664, 289, subd. (a)), three counts of child endangerment (§ 273a, subd. (b)), sexual battery (§ 243.4, subd. (e)(1)), and battery of a spouse (§ 243, subd.) (e)(1)). The jury also found true allegations defendant personally used a firearm when committing the offenses of dissuading a witness and criminal threat. The trial court reduced the conviction for dissuading a witness to witness intimidation (§ 136.1, subd. (a)(1)), for lack of a specific finding by the jury regarding use of force or threat. Defendant was sentenced to serve eight years in state prison.

On appeal, defendant contends (1) the evidence was insufficient to convict him of attempted forcible penetration or sexual battery on the victim, (2) the jury heard unduly prejudicial evidence regarding his prior acts of domestic violence on the victim, (3) the trial court erred in denying his motions for disclosure of juror identifying information and a continuance to further investigate possible juror misconduct, (4) the trial court should have granted his motion for a new trial based on newly discovered evidence, (5) section 654 requires his sentence for sexual battery to be stayed, and (6) he is entitled to a remand for resentencing on his firearm enhancement under Senate Bill No. 620 (2017–2018 Reg. Sess.) (Stats. 2017, ch. 682, § 1 (SB 620)).

We conclude substantial evidence supported the jury's convictions of defendant on the counts of attempted forcible penetration and sexual battery. The prior acts evidence was very similar to the conduct for which defendant was charged and was not unduly inflammatory. The trial court properly denied the new trial motion because the proposed evidence was not newly discovered but a new expert opinion regarding previously disclosed evidence. Consistent with section 654, we stay the sentence on defendant's conviction of sexual battery. And we remand the matter to allow the trial court to

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[1] Undesignated statutory citations are to the Penal Code.

exercise its newly granted discretion under SB 620 to strike or dismiss the firearm enhancements.[2]

FACTUAL AND PROCEDURAL HISTORY

The Present Offenses

Defendant and the victim married in 1992 and had 14 children together. During trial, the victim was pregnant with their 15th child. In February 2015, 12 of the children still lived at home at their residence in Anderson.

On February 2, 2015, the victim left defendant in charge of three children while she went to do a pick up at preschool. When the victim returned, she found the three children in the rain in the driveway area in front of the house. The victim grew angry because defendant had not supervised the children. Defendant walked into the house 30 minutes later. He denied failing to supervise the children. The victim was angry and told him that she and the children would move out. The victim left and spent two hours trying to find a new place to live before she gave up and returned. Upon her return, she found defendant had thrown her clothes outside and into the rain.

That night, the victim went to bed in the master bedroom of the house. She wore long pants and a long blouse to bed. Around midnight, defendant came to bed and tried to embrace her. The victim was still angry and told him, "No, I don't like you. . . . You go away." Defendant indicated he wanted to have sex with her, and the victim refused. Defendant pulled his pants down to expose his erect penis, pulled down her pants to knee level, and placed his hand over her vaginal area. Defendant attempted to insert his fingers into her vagina. The victim pushed his hand away and tried to pull her pants up. When she tried to get up from bed, defendant put his hands on her shoulders and pushed her back down. Defendant got angry and walked out.

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[2] The panel as presently constituted was assigned to this matter on August 31, 2018.

Defendant returned a second time at 1:00 a.m. He embraced the victim, spoke nicely to her and indicated he wanted to have sex. Defendant pulled her pants down a second time. And the victim again responded by saying, "no" and pulling her pants back up. The victim told him to leave the room and he did.

After another hour, defendant returned a third time. She told him, "Go away. I don't want you." The victim told the officer that "similar conduct happened again the third time" during which he pulled her pants down, she pushed his hands away from her vaginal area, and pulled her pants up. Defendant became "really upset," left and again threw the victim's clothes out.

The victim testified defendant requires her to have sex with him every night. At trial, she acknowledged she may have told the police she had to have sex with defendant every night to avoid him becoming violent with her.

At 3:00 in the morning, the victim saw defendant with a black handgun pointed downwards. The victim later told police that defendant threatened: "If you call the police and get another restraining order, I will kill you and everyone in here." The victim believed he would follow through with the threat.

Shortly after 9:00 a.m. on February 3, 2015, City of Anderson Police Officer Eric Haynes responded to One Safe Place – a women's refuge shelter. The victim appeared scared. Officer Haynes interviewed the victim without the need of an interpreter because he discerned one was not necessary. The victim recounted defendant's assaults on her. At trial, the victim recanted and claimed she misunderstood the police officer's questions due to a language barrier. However, she acknowledged her daughter was there and able to translate.

After defendant's arrest, the victim visited defendant in jail several times. During trial, the victim recanted her accusations regarding defendant's conduct on February 2 and 3, 2015. She claimed a language barrier had created misunderstandings and

defendant had not assaulted her. The victim further testified defendant sought her consent before attempting to have sex with her.

Defendant's Post-arrest Statements

After interviewing the victim, Officer Haynes went to the residence of defendant and the victim where he saw a pile of clothes "in front of the front door in the lawn, dirt, mud area." Officer Haynes found defendant hiding inside a tarp in the backyard. Defendant received a *Miranda* advisement and responded to questions by the police officer. Defendant stated he had been watching the children the day before and he and the victim had just argued "a little bit." Defendant denied engaging in any domestic violence. He stated the victim became angry when he suggested she had a boyfriend.

During the previous night, defendant stated he and the victim had slept in the same bed. Defendant wanted to have sex with C.L, but she refused him. Defendant acquiesced and did not "push her." Defendant admitted he was a "little bit" upset. Defendant gave the victim a hug while she was sleeping, but she said, "no" and then pushed him away. Defendant tried "two or three times" but the victim refused each time. Defendant admitted pulling down her pants, but stated she pulled them up each time. Defendant was "touching her . . . thigh" when the victim "pushed [his] hand away." He stated, "I don't . . . jam up her, no." Later defendant passed through the hallway with a .22 caliber gun in his hand, but he then put it away.

Evidence Regarding Domestic Violence

The prosecution called Shasta County District Attorney's Office Inspector Mick Wallace as an expert on domestic violence. Inspector Wallace explained that research shows domestic violence tends to occur in a distinct cycle that is characterized by tension building, a violent outburst, a honeymoon cycle, followed again by tension building. Domestic violence victims are often hesitant to report the abuse for fear of further victimization. Inspector Wallace noted that regularly "victims would describe submitting to a sexual act so that they wouldn't be beaten . . . ." He also noted that, "in fact, it's very

common for victims to stay in abusive relationships, recant initial statements to law enforcement . . . ."

Prior Acts Evidence

In April 1999, the victim went to One Safe Place and filled out paperwork for a restraining order against defendant. The victim told the person at One Safe Place who was helping her secure the restraining order that defendant hit her in the head with a telephone and pulled her hair. The victim further reported defendant had choked her in March 1999. At some point, defendant hit her on her left leg and left a bruise. At other times, defendant threatened to kill her with a knife and to poison her when she went to sleep. Defendant told her he would then take their children and report to everyone that the victim had killed herself. At a later point, the victim cancelled the restraining order on grounds she and defendant had reconciled. During trial, the victim recanted and said these allegations were not true.

At some point, the victim told people at One Safe Place that defendant beat her in 2001 and did not allow her to call the police.

In 2008, the victim went to One Safe Place to report defendant had been physically abusive toward her and the nine children they had at that time. The victim stated she and defendant had argued, he had pushed her, and then he forced her to have sex with him. Defendant did not allow her to use birth control and wanted her to have more children. Defendant lost his job in 2008 and stopped supporting the family. The victim reported defendant was "always putting [her] down and never helps with the children he's forced [her] to have." There was not a single conversation between them during which defendant did not yell at or threaten the victim. Defendant also called her "stupid," "fat," and "ugly." Defendant forced the victim to do things against her will.

At trial, the victim admitted she had gone to One Safe Place "three or four times."

In December 2014, police responded to the residence of defendant and the victim. The victim told Officer Haynes that defendant hit her in the mouth. After this incident, the victim went back to One Safe Place and sought another domestic violence restraining order. The victim told a person at One Safe Place she thought it was a good idea to divorce defendant. Whenever the victim needed to take the children to school or otherwise leave the house, defendant would "wait for [her] at the door with a knife." Defendant was "constantly harassing the kids about [her] whereabouts." She also told the person at One Safe Place "in 2014 that if [she] upset the defendant in any way he use[d] objects to strike [her]." Officer Haynes arrested defendant.

The victim obtained a restraining order in 2014 that the victim cancelled a few months later because she wanted defendant to help her with the children.

At trial, the victim recanted and said she had hit her head on a drawer while standing up and the whole incident had been a misunderstanding. She also stated defendant had used only a "fake" knife – "a kid's machete toy."

Defense Evidence

The defense called defendant's daughter, E., to testify. During trial, E. testified she was 22 years old and had never seen defendant be physically abusive toward the victim. E. further stated she had never heard defendant threaten the victim. On cross-examination, E. acknowledged she had twice visited defendant in jail within the prior three months.

DISCUSSION

I

Evidence of Attempted Forcible Penetration and Sexual Battery

Defendant argues the evidence was insufficient to convict him of attempted forcible penetration (§§ 664/289, subd. (a)) and sexual battery (§ 243, subd. (e)(1)). Defendant asserts that "reasonable assumptions of intimacy associated with the relationship of husband and wife" mean his "touching of [the victim's] vagina was not

against her will because he desisted as soon as [the victim] said no. Further no force was involved in the touching." We reject the argument.

A.

Substantial Evidence Standard of Review

As the California Supreme Court has explained, " 'In considering a claim of insufficiency of evidence, a reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, "but our opinion that the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial.' (*People v. Earp* (1999) 20 Cal.4th 826, 887–888, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) Additionally, '[a]n appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence.' (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Moreover, an appellate court 'resolve[s] neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' (*Id*. at p. 403.)" (*People v. Panah* (2005) 35 Cal.4th 395, 487-488.)

B.

The Offenses

Section 289, subdivision (a)(1)(A), prohibits forcible penetration by providing that "[a]ny person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years." For purposes of subdivision (a) of section 289, force "includes circumstances where the victim did not want to engage in the act and the evidence does not otherwise establish the victim's

positive cooperation in act or attitude. (*People v. Young* (1987) 190 Cal.App.3d 248, 258.) It also includes the force used to accomplish 'the penetration and the physical movement and positioning of [the victim's] body in accomplishing the act.' (*Ibid*.)" (*People v. Thomas* (2017) 15 Cal.App.5th 1063, 1071.)

Subdivision (a) of section 289 may also be violated by means of duress. "Physical control can create 'duress' without constituting 'force.' 'Duress' would be redundant in the cited statutes if its meaning were no different than 'force,' 'violence,' 'menace,' or 'fear of immediate and unlawful bodily injury.' (Cf. *People v. Pitmon* [(1985)] 170 Cal.App.3d [38,] 50.) . . . '[D]uress' has been defined as 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to first, perform an act which otherwise would not have been performed, or, second, acquiesced [*sic*] in an act to which one otherwise would not have submitted.' As . . . recognized in *People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, duress involves psychological coercion. (*Id*. at p. 238.) Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 51; *People v. Superior Court* [*Kneip*], *supra*, 219 Cal.App.3d at p. 239.)" (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.)

Section 243.4, subdivision (e)(1), provides in pertinent part that "[a]ny person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery . . . ." For purposes of section 243.4, subdivision (e)(1), "it is settled that ' "without the victim's consent" ' has the same meaning as ' "against the victim's will." ' (*People v. Giardino* (2000) 82 Cal.App.4th 454, 460; see *People v. Lee* (2011) 51 Cal.4th 620, 635, fn. 10; *People v. Ogunmola* (1987) 193 Cal.App.3d 274, 279 (*Ogunmola*).)" (*People v. Robinson* (2016) 63 Cal.4th 200, 208.)

Defendant's argument rests on a flawed legal premise. He asserts that "it is the responsibility of a spouse to communicate somehow his or her decision not to engage in sexual relations on a particular occasion." Insofar as defendant's argument relates to forcible penetration (section 289, subdivision (a)(1)(A)), it is refuted by section 261.6, which provides that "[a] current or previous dating or marital relationship shall *not* be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289." (Italics added.) As to both forcible penetration and sexual battery, we reject the proposition that the victim bears the burden of communicating the lack of consent to sexual relations. "[W]e do not require that victims communicate their lack of consent. (See *People v. Maury* (2003) 30 Cal.4th 342, 403 [lack of consent need not be proven by direct testimony but may be inferred from use of force or duress].) We certainly do not require that victims resist. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1024–1025.)" (*People v. Ireland* (2010) 188 Cal.App.4th 328, 338.)

Defendant relies on inapposite authority in citing *People v. Andrade* (2015) 238 Cal.App.4th 1274. *Andrade* involved a claim that the defendant had a reasonable and good faith belief that his victims – some of whom had previously worked as prostitutes – consented to sexual intercourse. (*Id.* at pp. 1282, 1285, 1301.) *Andrade* held that a claim of reasonable but mistaken belief requires a subjective good faith mistake and an objective component requiring the "belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence" of a good faith mistake. (*Id.* at p. 1301.) The *Andrade* court concluded the defendant had not established either component. (*Id.* at pp. 1300-1301.) As to the objective component, the evidence showed defendant had assaulted and threatened each of his victims prior to sexual intercourse. (*Id.* at p. 1302-1303.) Nothing in *Andrade* supports defendant's assertion that a spouse has to affirmatively communicate refusal to engage in sex with the other spouse. Moreover, in this case, the victim affirmatively

communicated to defendant that she did not consent to sexual relations on the night of February 2 and 3, 2015. She told him "no" but he ignored her refusals.

We reject defendant's reliance on *State in Interest of M.T.S.* (1992) 129 N.J. 422, where the New Jersey Supreme Court interpreted a state statute providing that "permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances." (*Id.* at p. 446.) In reviewing the New Jersey statute, the *M.T.S.* court noted it is now well settled that "[n]o one, *neither a spouse*, nor a friend, nor an acquaintance, nor a stranger, has the right or the privilege to force sexual contact." (*Id.* at p. 446, italics added.) As we explain below, the evidence was sufficient to show defendant forced sexual conduct on the victim.

C.

Defendant's Forcible Conduct

The victim repeatedly rebuffed and refused defendant's sexual advances on the night of February 2 and 3, 2015. The victim made it clear to defendant she was angry about his failure to supervise the children early that day. The victim was so angry at defendant that she left in order to find a new place for her and the children to live. That evening, the victim and appellant slept in separate rooms because of their conflict. When defendant came into the victim's bedroom, he exposed his erect penis. The victim told him to go away. Defendant indicated he wanted to engage in sexual intercourse. But the victim told him, "no." Undeterred by her express refusals, defendant pulled down her pants and attempted to put his fingers into her vagina. The victim pushed his hand away as she said, "no." The victim pushed him away even though she reported that "she had to have sex with him every night or he became violent and angry at her." Further indicating defendant's disregard for her lack of consent, he pushed her down to the bed as she attempted to get away. That night, defendant would pull down her pants two more times. Each time, the victim would refuse and pull her pants back up again. Defendant's

conduct displayed a total disregard for her affirmative refusal to give consent before and after he attempted to digitally penetrate her.

II

Evidence of Prior Acts Involving Domestic Violence and Sexual Misconduct

Defendant next argues the trial court erred by admitting evidence of his prior acts of domestic violence and sexual misconduct against the victim. Defendant does not argue the evidence was inadmissible under Evidence Code sections 1101 and 1108, but only that the prior acts evidence was unduly prejudicial under Evidence Code section 352.

A.

Defendant's Objection

Prior to trial, defense counsel objected to the admission of prior acts evidence as unduly speculative, remote in time, irrelevant, and unduly prejudicial. The trial court conducted a hearing under Evidence Code section 402 and ruled the prior acts evidence admissible under Evidence Code sections 1108 and 1109. The trial court explained:

"I am allowing in the incident from 2008, September of 2008, because in that particular incident it's very similar or at least quite a bit similar to this particular incident, because the defendant had allegedly pushed [the victim] and forced her to have sex with him. He forbids her to use birth control, tells her to get an abortion if she doesn't want another child, but she doesn't believe in that.

"And she indicated that . . . June or July of 2008 . . . that there was not one conversation where defendant did not threaten or yell at her. [¶] There was also a threat to take her children, kill the family dog. He slapped her, grabbed her, pinned her down, pulled her hair, pinched her, hit her with his fist, kicked her and strangled her.

". . . I find that it's not remote in time, even though it's approximately six years prior to this alleged or charged incident."

Ultimately, the trial court allowed the prosecution to introduce evidence defendant hit and threatened to kill the victim in 1998, abused the victim on a daily basis in 1999, beat her in 2001, beat her and forced her to have sex in 2008, hit her in 2014 during a period when he harassed her every day.

The trial court explained the rationale for admitting the prior acts evidence as follows:

"I do find that it is in the interests of justice to include earlier acts [more than 10 years prior], and my impression of the evidence is that this has been . . . going on for a very long period of time.

"You know, whether the victim actually says that today, I don't know what she's going to say. I think a lot of it's going to be up to the jury to assess her credibility, but I think it would be inappropriate to exclude it, because if that's the fact or that's what was occurring, it paints a more accurate picture of why this particular witness, [the victim], would be reluctant to testify against her husband, reluctant to report this, . . . why she would retract her consent for the people at One Safe Place to talk to the district attorney or law enforcement, and there's really no way to just pull out, like, certain acts and not allow them in. It would . . . potentially paint an inaccurate picture of what [the victim] is saying or has said occurred.

"So, it was actually pretty difficult to try to assess whether this should come in or not, but . . . if I look at the totality of the circumstances, all the information that I'm aware of, it seems much more probative than prejudicial. It's not going to consume a lot of time, I don't believe, to bring up this information . . . ."

B.

Evidence Code Section 352

Evidence Code section 352 provides that a trial court "in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will: (a) necessitate undue consumption of time; or (b) create substantial

danger of undue prejudice, of confusing the issues, or of misleading the jury." It is well settled that, "[u]nder Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.) Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

C.

Prior Acts Evidence

"To start our analysis of the balance between probative value and undue prejudice under section 352, we look to the probative value of the evidence." (*People v. Kerley* (2018) 23 Cal.App.5th 513, 535.) Defendant ignores this prong of the analysis by foregoing any acknowledgment of the probative value of the prior acts evidence. Nonetheless, our examination of the record confirms the trial court's determination that the prior acts evidence was highly probative on the charges against defendant.

The prior acts evidence showed defendant abused and assaulted the victim in a very similar manner over the course of several years. The 2008 incident involved defendant pushing the victim and forcing her to have sex with him in a manner substantially similar to the attempted digital penetration in 2015 when he pushed her down onto the bed and attempted to digitally penetrate her. The threats in 1999 and mid-2008 threats to kill the victim mirrored the criminal threat committed in 2015 when he threatened the use of the gun to kill the victim and the children. So too, defendant's threat in 2001 about the victim calling the police was similar to the current incident during which he threatened to kill the victim if she called the police. The 2014 domestic

violence incident showed defendant's willingness to use force against her when he became frustrated – a foreshadowing of defendant's willingness to use force against the victim during the currently charged incident. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282-283, 285 [evidence of similar prior sexual offenses is "indisputably relevant" to currently charged sex offense]; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [evidence of prior domestic violence was "extremely probative" on current charge of domestic violence].) Furthermore, this incident was highly probative of the victim's actual fear on the night of February 2 and 3, 2015, in light of defendant's prior willingness to inflict threatened violence. In short, the prior acts evidence was highly relevant and probative because it involved the same defendant and victim and bore striking similarity to the charged conduct for which defendant was tried.

The prior acts evidence was not unduly inflammatory. Due to the similarity of defendant's earlier conduct, the prior acts evidence was no more egregious or damaging than the evidence regarding charged offenses. And the prior acts evidence was introduced succinctly and in the same manner as the evidence of the charged offenses – namely through the testimony of the victim and Officer Haynes. The prior acts evidence did not consume an undue portion of trial.

Rather than compare the probative value of the prior acts evidence with its potential prejudicial effect, defendant asserts the prior acts constituted a "mountain" of evidence the jury could not help but use to convict him based solely on disdain and contempt. Defendant's argument essentially equates the highly probative nature of the prior acts evidence with prejudice to him. However, " '[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 958, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638.) Instead, " '[t]he "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an

individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " (*People v. Karis*, *supra*, at p. 638.) Here, the evidence was not unduly prejudicial.

Moreover, any potential prejudice was alleviated by the trial court's giving of CALCRIM No. 852 with which it instructed the jury: "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. . . . [¶] . . . [¶] . . . If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient to prove [the charged offenses]."

We reject defendant's assertion that the limiting instruction in this case was founded on a naive assumption that the jury would follow it. "The presumption is that limiting instructions are followed by the jury." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Defendant does not overcome this presumption by pointing to any indication in the record that the jury did not follow the instructions given by the trial court. Moreover, as we have noted, the evidence was presented in a concise manner and was no more inflammatory than the evidence regarding the charged offenses. Consequently, we conclude the trial court did not abuse its discretion in determining the prior acts evidence to have been more probative than prejudicial under Evidence Code section 352.

III

Motions for Disclosure of Juror Information and for a Continuance

Defendant contends the trial court erred by denying his motion for disclosure of juror identifying information and by refusing to grant a continuance to allow defense counsel to further explore the possibility of juror misconduct. We are not persuaded.

A.

Defendant's Motions

After trial, defense counsel filed a motion for a continuance of judgment and sentencing in order to conduct additional investigation into possible juror misconduct. In support of the motion, defense counsel included a declaration in which she stated she had been able to locate four jurors on Facebook. One of the jurors responded to a message sent by defense counsel via Facebook. The juror indicated that "the jurors were rushed to make a decision because of the juror that had to leave Redding to catch a flight." The juror agreed "to share her opinions with the Court." Based on the correspondence with this juror, defense counsel sought a continuance to "conduct an investigation into the jury deliberation process and whether jurors improperly reached a decision based upon a lack of time for meaningful deliberations."

On the same day defense counsel filed the motion for a continuance, she also filed a petition for disclosure of juror identifying information. The grounds for the petition were the same as given in the motion for a continuance.

The trial court heard the motion and petition. During the hearing, defense counsel indicated she had prepared a declaration for the corresponding juror, the juror had "approved of the language," but had not yet signed it. The trial court denied the motion and petition. The court explained it was "not at all persuaded by what [the corresponding juror] says. This jury knew that they had until through Friday. . . . So there was no need to be done before noon, anything like that." The trial court further noted it was a hung jury on two counts. On the counts the jury could not agree upon, the trial court asked whether jurors needed more time. However, the jurors did not need more time because "[t]hey were hopelessly deadlocked on those counts."

B.

Motion to Disclose Juror Identifying Information

As the California Supreme Court has noted, " 'strong public policies protect discharged jurors from improperly intrusive conduct in all cases.' (*In re Hamilton* [(1999)] 20 Cal.4th [273,] 304, fn. 24; see also *Ballard v. Uribe* (1986) 41 Cal.3d 564, 575-578 (conc. opn. of Mosk, J.).) The uncontrolled invasion of juror privacy following completion of service on a jury is, moreover, a substantial threat to the administration of justice." (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1092.) Thus, juror identifying information is sealed after a jury reaches a verdict in a criminal case. Code of Civil Procedure section 237, subdivision (a)(2), provides that "[u]pon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors . . . consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section."

Under Code of Civil Procedure section 206, "a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers." (Code Civ. Proc., § 206, subd. (g).) However, all requests for disclosure of juror identifying information must conform with requirements set forth in Code of Civil Procedure section 237, subdivision (b), which requires a declaration establishing good cause.

"Good cause, in the context of a petition for disclosure to support a motion for a new trial based on juror misconduct, requires 'a sufficient showing to support a reasonable belief that jury misconduct occurred. . . .' (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; accord, *People v. Wilson* (1996) 43 Cal.App.4th 839, 850-852.)

Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported. (See *Wilson*, at p. 852.)" (*People v. Cook* (2015) 236 Cal.App.4th 341, 345-346.) "If the trial court finds that the moving party has made a prima facie showing of good cause, and if it finds no compelling interest against disclosure, it must set the matter for hearing. (Code Civ. Proc., § 237, subd. (b).)" (*People v. Johnson* (2013) 222 Cal.App.4th 486, 492.)

Trial courts have broad discretion to allow, limit, or deny a petition for juror identifying information, and "[w]e review the denial of a petition for disclosure for an abuse of discretion." (*People v. Cook, supra*, 236 Cal.App.4th at p. 346; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 380.)

The trial court did not abuse its discretion in denying defendant's petition for disclosure of juror identifying information. The purported information from the corresponding juror regarding the jury being rushed to a verdict did not constitute proof of overt acts that can establish juror misconduct. Evidence Code section 1150, subdivision (a), provides in pertinent part that "[n]o evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him [or her] to assent to or dissent from the verdict or concerning the mental processes by which it was determined." Regarding subdivision (a) of Evidence Code section 1150, the California Supreme Court has explained:

"This statute distinguishes 'between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . .' (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349.) 'This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his [or her] own or his [or her] fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and

the other senses and thus subject to corroboration.' (*People v. Hutchinson, supra,* at p. 350 . . . .)" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

The corresponding juror's subjective feeling that the jury's decision might have been rushed would not have been admissible to impeach the verdict even if the proposed declaration had been signed. "The declaration [by a juror that the process was rushed] falls within this category because it states that jurors failed to vote on some issues, were discouraged from asking questions, and were rushed into deciding on a verdict. It was properly disregarded [by the trial court]." (*Bandana Trading Co., Inc. v. Quality Infusion Care, Inc*. (2008) 164 Cal.App.4th 1440, 1446.) The California Supreme Court has similarly held that, "while the *conduct* of jurors . . . complaining about the pace of deliberations may be scrutinized, the *effect* of this conduct on subsequent votes may not be." (*People v. Cox* (1991) 53 Cal.3d 618, 695, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In this case, the proposed declaration regarding the corresponding juror's *feeling* of being rushed provided no proof of overt acts warranting disclosure of juror identifying information under Evidence Code section 1150. For this reason, the trial court properly denied the petition for disclosure.

C.

Motion for a Continuance

The motion for a continuance sought additional time for defense counsel to secure the signature of the corresponding juror on a proposed declaration introduced into the record. As explained above, the declaration would not have been sufficient to impeach the jury's verdict even if the corresponding juror had signed it. Consequently, the trial court did not abuse its discretion in denying defense counsel additional time to seek the corresponding juror's signature. The signature would not have rendered the petition for disclosure of juror identifying information meritorious.

IV

Motion for New Trial Based on Newly Discovered Evidence

Defendant argues the trial court erred in denying his motion for a new trial based on newly discovered evidence. The evidence offered in support of the new trial motion, however, was not newly discovered. It was newly acquired opinion testimony regarding previously known evidence. Accordingly, we conclude the trial court properly denied the new trial motion.

A.

Motions for a New Trial Based on Newly Discovered Evidence

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328, quoting *People v. Sutton* (1887) 73 Cal. 243, 247–248.) A new trial motion based on newly discovered evidence " 'should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his [or her] part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial.' " (*People v. Drake* (1992) 6 Cal.App.4th 92, 98, quoting *People v. Love* (1959) 51 Cal.2d 751, 757-758.) However, "[f]acts that are within the knowledge of the defendant at the time of trial are not newly discovered even though he [or she] did not make them known to his [or her] counsel until later, [citations] and it must appear that evidence, rather than merely its materiality, be newly discovered in order to support a motion for a new trial on that ground." (*People v. Greenwood* (1957) 47 Cal.2d 819, 822.)

We note the well-settled rule that "the conclusion of the trial court in denying a motion for new trial based upon the grounds of newly discovered evidence will not ordinarily be disturbed on appeal. This is true since the trial judge, because of his [or her] familiarity with the facts and circumstances of the entire case, is in a far better position to determine the effect and value of such evidence than is the reviewing court. *Dry v. City & County of San Francisco*, 83 Cal.App.2d 790. Consequently such a determination by the trial court will not be reversed unless it is '. . . affirmatively shown or manifestly appears that he [or she] has abused the sound discretion confided to him [or her].' *Perry v. Fowler*, 102 Cal.App.2d 808." (*People v. Raquel* (1954) 125 Cal.App.2d 384, 385.)

B.

Proposed Opinion Testimony by Dr. Caruso

After the jury convicted defendant, defense counsel filed a motion for new trial based on newly discovered evidence in the form of opinion testimony from Dr. Kent Caruso, a licensed clinical forensic psychologist. Dr. Caruso interviewed defendant, the victim, and several of their children. Dr. Caruso was supplied with police reports and the restraining orders obtained by the victim. On this information, Dr. Caruso opined he did not observe "traits in [defendant] to any significant degree" that are commonly observed in domestic violence abusers or "symptoms" in the victim that are "commonly observed in domestic violence victims." Dr. Caruso further opined the children did not display the hallmarks of exposure to violence within the home. And Dr. Caruso noted a lack of physical injuries described in the police reports. Finally, Dr. Caruso stated that the " 'cycle of violence' " paradigm might be inapplicable to various "cultural groups" other than "white, American, English-speaking women."

The prosecution opposed the new trial motion on grounds the evidence was not newly discovered and was based on unreliable statements by defendant and his family.

The trial court heard the matter and denied the motion for new trial on several grounds. The trial court expressly found the attorneys for the parties each "did a great job on this trial" and each "effectively presented evidence." The trial court noted that a hearing held outside the presence of the jury before the victim testified indicated "where her head was at the time of trial." The trial court found defense counsel had been effective in cross-examining the victim at trial and the addition of Dr. Caruso's opinion would not have made any difference in the outcome. Dr. Caruso's opinion also was not important to rebut Investigator Wallace's testimony because the investigator's testimony was not crucial evidence at trial. The possibility Dr. Caruso could have shed light on the victim's medical records regarding the victim's ability to use birth control would be irrelevant because the victim "already said that [defendant] did not allow her to use birth control."

The trial court also raised the "question that it's truly newly discovered" evidence. As the court noted, defense counsel was well prepared to impeach the victim along the lines of the proposed topics to be addressed by Dr. Caruso's testimony. Moreover, the trial court noted that Investigator Wallace was disclosed as a witness before trial with sufficient time to have allowed the defense to have secured opinion testimony such as that of Dr. Caruso.

The trial court summed up Dr. Caruso's opinion as merely that the evidence regarding defendant's family was "not consistent with understanding of domestic violence." Thus, the trial court determined that "much of what Dr. Caruso would testify to could either be refuted or just be found to be consistent with what Investigator Wallace says."

C.

The Evidence Was Not Newly Discovered

The record shows Dr. Caruso's proposed testimony did not constitute newly discovered evidence but merely an opinion regarding evidence already known to the

defense prior to trial. Notably, defendant's argument on appeal does not attempt to show how Dr. Caruso's testimony constituted newly discovered evidence. We defer to the trial court's findings that defense counsel was well prepared to counter and cross-examine the witnesses on each key point in the testimony of the victim and Investigator Wallace. And, regarding the medical records, we note the trial court's express finding that Dr. Caruso's proposed testimony would not have made any difference because defendant forbade the victim from using birth control – regardless of whether the victim was medically able to use unspecified means of birth control. For lack of newly discovered evidence, the trial court properly denied the motion for new trial.

In a belated and undeveloped argument raised for the first time in the reply brief, defendant asserts ineffective assistance of counsel in failing to earlier "discover" the opinion testimony of Dr. Caruso. The argument is forfeited for failure to timely raise it. (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 268 [argument presented for the first time in a reply brief is deemed forfeited].) Moreover, the argument lacks merit. After a close examination of the evidence adduced at trial, the trial court found Dr. Caruso's testimony would not have made a difference in the outcome because it addressed matters that had already been effectively cross-examined and resulted in the victim's recanting. Defense counsel was not ineffective for failing to introduce evidence that would not have made a difference in the outcome. (*In re Harris* (1993) 5 Cal.4th 813, 832-833 [holding defendant claiming ineffective assistance of counsel must show deficient performance and "must also show prejudice flowing from counsel's performance or lack thereof"].)

V

Section 654

Defendant contends his sentence for sexual battery (§ 243.4, subd. (e)(1)) should be stayed under section 654 because it relates to the same conduct as the attempted forcible penetration (§§ 289, subd. (a), 664). The Attorney General concedes the

sentence for battery should be stayed. Pursuant to section 654, we order defendant's sentence for sexual battery stayed.

Section 654, subdivision (a), provides in pertinent part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Under section 654, "when a court determines that a conviction falls within the meaning of section 654, it is necessary to *impose* sentence but to stay the *execution* of the duplicative sentence . . . ." (*People v. Duff* (2010) 50 Cal.4th 787, 796.)

Here, the trial court ordered concurrent sentences for the attempted forcible penetration and the sexual battery. This was error because both offenses related to the same act of defendant putting his hand on the victim's vaginal area. During closing arguments, the prosecution expressly related both counts to this same act. Accordingly, the judgment is modified to impose and stay the sentence for defendant's conviction of sexual battery.

VI

Section 12022.5 Sentencing Discretion

In a supplemental brief, defendant contends we must remand this case for resentencing to allow the trial court to exercise its newly granted sentencing discretion under SB 620 that amended sections 12022.5 and 12022.53. (Stats. 2017, ch. 682, §§ 1 & 2.) The Attorney General acknowledges SB 620 made changes to sentencing law that are retroactive, but argues remand would be futile in this case. We conclude this matter must be remanded for a new sentencing hearing.

Defendant was sentenced in September 2015 at a time when the trial court lacked statutory discretion to strike the four-year firearm enhancement imposed under former section 12022.5, subdivision (a). (Stats. 2011, ch. 39, § 60, effective June 30, 2011, operative Jan. 1, 2012.) However, under SB 620 trial courts were endowed with

discretion "in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.5, subd. (c); Stats. 2017, ch. 682, § 1.) For the reasons stated by this court in *People v. Woods* (2018) 19 Cal.App.5th 1080, we conclude the recent amendment to section 12022.5 is retroactive and applies to this case. (*Woods, supra*, at pp. 1090-1091.)

The Attorney General argues that statements made by the trial court during sentencing indicate remand is unnecessary because there is no reasonable probability the trial court would exercise its discretion to strike the firearm enhancement. The trial court did state the crimes for which defendant was convicted were more serious than comparable crimes of domestic violence. The trial court also took a dim view of defendant's purported expressions of remorse, finding instead that defendant's claims of regret rang "pretty hollow." Nonetheless, the trial court also noted it had "been struggling" with determining the correct sentence. In particular, the trial court noted: "On the weapon enhancement, I've really gone back and forth on this" but ultimately decided not to select the mitigated term. The trial court's statements thus indicate remand is warranted for exercise of the trial court's new sentencing discretion under SB 620.

DISPOSITION

The judgment is modified by staying sentence on defendant's conviction for sexual battery (Pen. Code, § 243.4, subd. (e)(1) [count 9]). The matter is remanded to the trial court to exercise its discretion as to whether to strike or dismiss the firearm enhancement. The judgment is otherwise affirmed. Upon its resolution of the matter, the

trial court shall amend the abstract of judgment consistent with this opinion, and is directed to forward certified copies of the amended abstract to the Department of Corrections and Rehabilitation.

/s/
HOCH, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
DUARTE, J.